

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-12855
Non-Argument Calendar

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT OCTOBER 20, 2005 THOMAS K. KAHN CLERK

D. C. Docket No. 99-00031-CR-3-CDL-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH TYRONE SHAW,
a.k.a. Kay
a.k.a. Kim,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(October 20, 2005)

Before BARKETT, HULL and WILSON, Circuit Judges.

PER CURIAM:

Appellant Kenneth Tyrone Shaw appeals his reduced 120-month sentence
for possession with intent to distribute cocaine base in an amount in excess of 50

grams, which sentence was imposed following the government's motion to reduce sentence pursuant to Fed. R. Crim. P. 35(b). Shaw argues that the order reducing his sentence should be reversed because he was not given notice of the government's motion, an opportunity to be heard on the motion, or the right to counsel.

On appeal, Shaw argues that a court's action on a Rule 35(b) motion for reduction of sentence amounts to a re-sentencing, which gives the court discretion to modify the sentence, and, therefore, the same protections afforded a defendant during sentencing are necessary at the motion hearing. The government acknowledges that it erred in its attempted service of the Rule 35(b) motion, and submits that the district court's order on the motion should be vacated and the case remanded for reconsideration.

Accordingly, the order of the district court is vacated and the matter remanded for reconsideration. Representation of counsel that begins on appeal continues automatically on remand; thus Shaw will have the assistance of counsel on remand because this Court's order appointing counsel for him will remain in effect.

VACATED AND REMANDED.